112-713

~~112-731~~

# Assignment of Errors and Prayer for Reversal.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 118.

SOLOMON HALFERTY, PLAINTIFF IN ERROR,

*vs.*

HERMAN WILMERING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

IN THE

# Supreme Court of the United States.

SOLOMON HALFERTY,
*Plaintiff in Error,*

*vs.*

HERMAN WILMERING.

## ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

The court erred—

1. In overruling plaintiff's demurrer to defendant's answer.

2. In refusing to charge as requested in each of the following paragraphs of plaintiff's requests, viz.: first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth.

3. The court erred in each of the following paragraphs of its charge, to-wit: first, second, third, seventh and tenth.

4. In holding that the agreement as to the deposit of one thousand dollars was a condition precedent.

5. In allowing the letter from Wilmering to Roder and Reed, of the date of October 4, 1876, to be read in evidence.

Wherefore the said plaintiff in error prays that the said judgment may in all respects be reversed.

GALUSHA PARSONS,
*Attorney for Plaintiff in Error.*

112-713

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 118.

SOLOMON HALFERTY, PLAINTIFF IN ERROR,

*vs.*

HERMAN WILMERING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

## BRIEF FOR PLAINTIFF IN ERROR.

GALUSHA PARSONS,
*of Counsel for Plaintiff in Error.*

PARSONS & PERRY,
*Attorneys.*

STATE CENTRAL PRINTING CO., P. O. SQUARE, DES MOINES.

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1884.**

SOLOMON HALFERTY,
*Plaintiff in Error.*
*vs.*
HERMAN WILMERING,
*Defendant in Error.*
*No. 118.*

*In Error to the Circuit Court of the United States for the District of Iowa.*

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT.

THIS action was commenced by the plaintiff in error, April 19, 1878, upon a written contract for the delivery of one thousand hogs to plaintiff, for the recovery of damages, by reason of defendant's failure to perform his contract. Issues were joined, a trial had, and the jury failed to agree. Upon their discharge plaintiff was given leave to amend his petition, and he thereupon filed a new or substituted petition—Trans., p. 8—to which defendant answered *first*, by a general denial, and *second*, by setting out the same contract upon which plaintiff had declared, and alleging a failure to perform upon the part of the plaintiff, and asking damages for such failure.

Contract. Trans., p. 10.

Answer to substituted petition, Id., p. 11

The plaintiff demurred to this second division of the answer —Id., p. 12—and before any ruling was had upon the demurrer, defendant asked leave *to withdraw* that division, which was granted and it was withdrawn—Id , 12, 13—leaving the case to be tried upon the substituted petition and the denials contained in the answer to it.

In the original answer defendant had set up the contract, making it by referring to it, as annexed to plaintiff's original petition, a part of the answer. Id., p. 11. Upon the trial plaintiff claimed that defendant by this division of the original answer *affirmed* the contract, if there had been a failure as was claimed by defendant by the plaintiff to deposit the sum agreed to have been deposited at the place agreed upon, or that it was a ratification of the acts of defendant's agents in agreeing upon a *substitute* for such deposit.

Upon the second trial the jury found for the defendant, and after a motion for a new trial—Id., pp. 20-22—was overruled, judgment was rendered upon the verdict, to reverse which this writ of error is brought.

## ASSIGNMENT OF ERRORS.

I. The court erred in holding that under the issues it was incumbent upon plaintiff to show that he had deposited the thousand dollars in the Union Stock Yards National Bank.

Trans., pp. 22-23.

II. The court erred in the first, second, and third paragraph of its charge, which are as follows:

1. Before the plaintiff can recover for a breach by the defendant, he must by evidence prove that he performed all the conditions which the contract required him to perform. The parties have in writing defined the conditions which govern them. They fixed in terms very plainly the contract which bound them, and before either party could recover damages for a breach by the other he must prove that he has performed on his part all the conditions and that the other has failed to perform.

2. This contract is not an unusual one in its terms, and the stipulations therein contained are not exceptional. Covenants are oftentimes, I might say usually, embraced in contracts of this character, providing for a deposit of money to secure the faithful performance by the parties thereto. This stipulation is a part of the contract, and is a condition precedent to be performed by the parties before either could recover damages for a breach; and unless the deposit was made by the plaintiff, the defendant could abandon the contract; and if not made by the defendant, the plaintiff could abandon, unless the stipulation was waived or modified by the parties, or authorized by them to be waived or modified by Denny & Co. and Rader & Co. The parties to this contract fixed the amount of deposit at $1,000, and the depository was named the Union Stock National Bank. The parties might have fixed a smaller or larger amount and some other depository, but they selected this bank and named it in writing in the contract.

3. Having fixed the place of deposit and agreed to put this amount in the bank, which was to be forfeited on failure of either party, it is a condition of the contract, a part of it necessary to be complied with, and the plaintiff cannot recover damages for a failure on the part of the defendant to deliver the hogs unless he deposited the $1,000 in this bank, or such stipulation was waived or modified.

Trans., pp. 25, 26.

III. The court erred in the 7th and 8th paragraphs of its charge, which are as follows:

7. There is evidence introduced by the plaintiff tending to show that the agents of the parties who had money in their possession entered into an arrangement to hold their own checks drawn on the Stock Union Bank in favor of Halferty & Wilmering for $1,000, and that this arrangement was done with the assent of Halferty & Wilmering, and was by them substituted in the place of the stipulation in the contract for a deposit in the Union Stock Bank. The defendant introduces evidence contradicting this evidence, and he denies it in his own behalf. If you believe the evidence, direct or circumstantial, proves this to be the fact, that such an arrangement was substituted in place of the stipulation, then the action of these persons, Denny & Co. and Rader, in drawing the checks and holding them as a substitute for the deposit specified in the contract would bind the parties, and the plaintiff could recover.

But although Denny and Rader were the general agents of these parties, plaintiff and defendant, for the sale of live stock sent by them to Chicago, they could not change the terms of the within contractor; or consent to any change by the other without specific or special instruction from their principals in the first instance, or a subsequent ratification by them, with full knowledge of the substituted arrangement.

8. They had no authority, by virtue of their employment as general

agents for the sale of live stock of the parties, to change this contract without instructions.

Trans., p. 26.

IV. The court erred in the ninth and tenth paragraphs of its charge, which are as follows:

9. But it is urged that the plaintiff and defendant both subsequently to the action of Denny & Rader, with reference to the checks, ratified and confirmed the arrangement with reference to the $1,000.

(Refer to telegram about $100 if Halferty wanted to withdraw.)

If the plaintiff or defendant, with full knowledge of the facts—that is, of the action of Denny & Rader, and refusal of the bank to take the deposit—ratified their action, then they are bound to the same extent as if they each had previously authorized them to do it.

10. The plaintiff claims that the defendant is estopped from denying that the plaintiff performed the stipulation in regard to the deposit of one thousand dollars, because of matters set up by him in answer filed May, 1878, to the original petition. I instruct you that the defendant is not prevented from proving that the plaintiff failed to perform the stipulation in gard to the deposit of one thousand dollars mentioned in the contract, under the pleadings.

Trans., pp. 26, 27.

V. The court erred in refusing to charge as requested by the *first* paragraph of plaintiff's requests:

First. That the following paragraph in the contract between the parties does not constitute a condition precedent, and a failure to deposit the money therein named would not defeat the plaintiff's right to recover in this action. If the jury shall find from the evidence that he would be entitled to recover under the contract if it did not contain said paragraph, namely:

"Each party hereby agrees to deposit one thousand dollars each in the Union Stock Yards National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited to the party who fails to perform his part of the contract,"

That the contract is complete without this paragraph, so far as the rights of the parties thereto are concerned in this action.

VI. The court erred in refusing to charge as requested by the *second*, *third* and *fourth* paragraphs of plaintiff's requests:

Second. That under the pleadings in this action, by operation of law, it is admitted that the plaintiff duly performed all the conditions of the contract to be by him performed.

Third. As it is alleged in the petition, in the second and third counts thereof, that the plaintiff duly performed all of the conditions of the contract upon his part by him to be kept and performed, such allegations are not put in issue by the defendant's answer, as it does not state the facts relied on specifically as controverting the allegations of due performance, alleged by the plaintiff, and the plaintiff requests that the court so charge as to the same counts of the petition separately and apart from the third count thereof, if it should decline as to the third.

Fourth. That it was not necessary, under the statutes of Iowa, namely, the Code of 1873, Sec. 2715, for the plaintiff to allege in his petition the facts constituting a performance by him of any of the conditions of said contract precedent to his right of recovery thereon; that it was sufficient for him to state, generally, that he duly performed all the conditions on his part, and as the petition so states, such allegations are not sufficiently controverted by the answer in this case, and therefore they stand admitted.

Trans., p 16.

VII. The court erred in refusing to charge as requested by the *fifth*, *sixth*, *seventh* and *eighth* paragraphs of plaintiff's requests.

Fifth. That if the jury shall find from the evidence that the plaintiff deposited or caused to be deposited the sum of one thousand dollars in the Union Stock Yards National Bank of Chicago, and that the same remained so on deposit until after the 1st day of January, 1877, such deposit was a performance by him of the contract in that respect, whether the said bank did or did not agree to accept and hold the same for the purpose named in the contract between the parties.

Sixth. If the plaintiff tendered to the said bank, upon the day of the making of said contract, and shortly thereafter, a check for the one thousand dollars as a deposit to be held by said bank for the performance of said contract, he then having the money in said bank subject to check, and the bank refused to hold the said check subject to the conditions of said contract, and he thereupon left the same in the hands of a responsible party, and the defendant did not, upon being so informed, if the jury shall find that he was so informed, dissent from such arrangement, such tender was a sufficient performance in law of the conditions of a contract in that respect.

Seventh. If you shall find from the evidence that—any time after the making of said contract the agents of the respective parties, then having the funds or checks of the parties in their hands, which they have received for the purposes of deposit, made an agreement to hold the same, and did so hold the same, and that the defendant, by telegram, instructed his agent to hold the money unless the plaintiff would pay one hundred dollars for release, or to give him the money if he would pay one hundred dollars for release, which was communicated to plaintiff, who then declined to pay

said sum, but said to the agent or person receiving such telegram, and in respect thereto then acting for the plaintiff, that he should hold the defendant to his contract, these facts would amount to a waiver of a strict performance of the contract as originally made; and if the plaintiff complied therewith by leaving his money in deposit as it then was, that fact will be a sufficient compliance with the conditions of the contract upon his part as to such deposit; and if you should find the other material facts of his petition to be true, namely, that he was at all times ready and willing to perform the contract upon his part, and to pay for the hogs when delivered according to its terms, your verdict should be in his favor.

Eighth. If you should find from the evidence that the plaintiff left with his agents, Denny & Redman, the sum of one thousand dollars, to be deposited by them on his account, as provided by the contract, and that they tendered a deposit thereof to the bank, which the latter declined to accept, and that the defendant deposited with his agents, Rader & Read, a like amount, which they tendered to the bank, and which the latter declined to accept, and that the plaintiff thereafter expressed his willingness to release plaintiff from this contract, and requested that the money so held by his agents, then, in fact, actually upon deposit in said bank, should be paid over to him, and at the same time offered to permit the money then in the hands of defendant's agents to be paid over to him, and that the latter then telegraphed defendant, asking what they should do, and the defendant then answered, in effect, that they should pay over the money to plaintiff upon his paying the one hundred dollars to be released from the contract, or otherwise retain the same, and that the plaintiff, upon being informed by them of said telegram, declined to pay said sums for a release, but informed the agent of plaintiff, or the person representing him in sending and receiving said dispatches, that he should hold defendant to the contract, these facts would constitute an acceptance of defendant's proposition as to said monies, and would be binding upon him whether he did or did not, in fact, then know of the arrangement which had been made, if you find that any such was made between his agents and the agents of the plaintiff, and it is entirely immaterial whether the defendant did or did not at that time know of such arrangement, or whether he did or did not subsequently thereto write to his own agent, requiring him to pay over the monies which he then held, and saying to him that he regarded the contract at an end, unless the latter facts were communicated to the plaintiff and assented to by him.

Trans., pp. 16, 17, 18.

VIII. The court erred in refusing to charge as requested by the *ninth* paragraph of plaintiff's requests.

Ninth. In his original answer in this action the defendant claims to recover from the plaintiff for a non performance of the contract upon the part of plaintiff, and alleges that he, the defendant, performed all of his

conditions upon his part in respect to such deposit. This fact constitutes an election upon his part to regard the contract as binding and valid, although there may have been prior to that time, a failure strictly to comply with its conditions upon the part of the plaintiff, and the defendant is now estopped from claiming that the said contract was invalid or did not become operative by reason of the refusal of the said bank to become a party thereto or to receive the said monies and to hold the same according to the conditions of the contract.

Trans., p. 18.

IX. The court erred in refusing to charge as requested by the *tenth* paragraph of plaintiff's requests.

Tenth. If you shall find from the evidence that Mr. Denny, acting for the plaintiff, made an agreement with Mr. Rader, acting or assuming to act for the defendant, that they should respectively retain in their hands the monies left with them to be deposited in the bank, for the reason that the bank had refused to receive the same according to the conditions of said contract, and that such arrangement was communicated to the plaintiff, and he assented thereto, and that it was afterwards communicated to the defendant by the plaintiff's agent, and he assented thereto, the same then become operative and binding; and if upon the part of the defendant the same was performed as so modified by his leaving his money in the hands of the party so holding it until after the 1st day of January, 1877, such arrangement or agreement is a waiver of a strict performance of the contract and a substitute therefor, and so far as that question is concerned your verdict should be for the plaintiff.

X. The court erred in receiving in evidence a letter from defendant to his own agents Rader & Reed.

Trans., p. 24.

The substance of the testimony bearing upon the competency of this letter is:

1. That both parties *by their agents* tendered the deposits to the bank as agreed upon, and that the bank declined to hold the same except as ordinary deposits, but neither plaintiff nor defendant was informed of its refusal, plaintiff living in Missouri and defendant in Iowa.

2. That after this refusal, the agents of both parties agreed each to hold the money of their principals, in place of the deposit

in bank, plaintiff having left his check with his agents, and at all times having a sum exceeding one thousand dollars there on deposit.

3. That when plaintiff was informed by the agents of both parties of the arrangement that they had made, he desired *to draw* his money, but defendant's agents refused, saying they would telegraph defendant who was then in Iowa, which they did in these words:

> Halferty is here and wants to draw his money; what shall I do about it?

To which defendant answered:

> Hold the money in Chicago unless he will pay $100.

Plaintiff declined to pay this sum, and told defendant's agents the money could remain where it was, as they, *the agents*, had agreed and that he should hold defendant to his contract.

The defendant then testified that he had no knowledge when he received the telegram from his agents and of his answer to it, that the bank had refused to receive the money; that upon the next day he received a letter from his agents informing him of its refusal *and of the arrangement which had been made*, and that he thereupon wrote his agents as follows:

> COLUMBUS JUNCTION, IOWA, October 4, 1876.
>
> RADER and REED.
>
> GENTLEMEN: In regard to a contract in hogs spoken of by Halferty and myself each, which you wrote me of, I would say that I don't want anything to do with it, as I don't care to give thirty days' time or more to him or any one else to make up their mind in as to what they want to do. His failure to pay me the $10, which I was entitled to, and the refusal of the bank to accept the forfeit-money spoken of, has made me conclude that it was advisable to drop the matter entirely, and I want you to act accordingly, and in so doing you will oblige.
>
> Yours truly,
>
> H. WILMERING,
> Per E.
>
> This letter was written by H. Wilmering's clerk to me, and I received same October 5, 1876.
>
> (Signed) D. S. REED.

Trans., pp. 23, 24.

The plaintiff then testified:

> That he was never notified of defendant's refusal to assent to said agreement between said Rader and said Denny, and that he never saw or heard of said letter from defendant to Rader and Reed, or knew that any such letter had been written until the same was offered in evidence.

Id., p. 25.

Assuming that there is no controversy as to these facts—

1. The making of the contract.

2. The refusal of the bank to hold the deposits, and that the agents of the parties made a substituted agreement each to hold the money for his principal.

3. That plaintiff being informed of this agreement desired to draw his money, and that upon defendant's refusing he consented that it should remain, and that he knew nothing of any change of purpose by defendant, and that plaintiff at all times held himself in readiness to carry out the contract, we suppose that the case presents these

POINTS OF LAW.

*First.* That the clause of the contract in these words, Trans., p. 3,

> Each party hereby agrees to deposit one thousand dollars ($1,000) each in the Union Stock Yard National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited to the party who fails to perform his part of the contract.

was not a *condition precedent;* that it was simply a penalty for a failure to *keep* the contract.

Contract, Trans., pp. 3–10.

*Second.* When the bank refused to hold the money as a special deposit for the purposes of the contract, that clause became inoperative, and plaintiff having tendered the same according to the terms of the contract, was in no worse position than he would have been if the bank had accepted the deposit.

[In *Brown vs. Slee*, 103 U. S., 837, this court said:

Neither could insist that the other had lost his rights under the contract until he had himself done what he was bound to do. The failure of both parties to perform on the day was equivalent to a waiver by each of the default of the other.]

*Third.* If this clause implies that the consent of the bank to hold the deposit should be obtained it was waived by the subsequent agreement between the agents of both parties, ratified by defendant and assented to by plaintiff, under which the money was *in fact* deposited *in the bank*, and it remained there, upon defendant's *refusing* his consent that plaintiff *draw* his money, and the latter's consenting to its remaining.

Trans., p. 23, 24.

[The agreement was then perfect, after which defendant could not, by notice to his own agents, not communicated to plaintiff, defeat or rescind it.]

*Fourth.* The true construction of the contract did not require that *plaintiff* should obtain the consent of the bank *to hold* the deposit. It was sufficient if the plaintiff in fact deposited the amount there, and that it was in fact there at all times until the expiration of the time fixed for the performance of the contract.

*Fifth.* If the clause of the contract was a condition there was no issue in respect to it. It is alleged in the petition (Trans., p. 9) that *plaintiff* DULY *performed all of the conditions of said contract upon his part to be kept and performed*

[The answer (Trans., p. 11) is a *general denial*, and that only. If the clause in question was a condition precedent it was not put in issue by this form of answer.

CODE, section 2715, reads:

SECTION 2715. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part.

Section 2717 reads:

SECTION 2717. If either of the allegations contemplated in the preceding section is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated.

And section 2812 provides that *every material allegation in a pleading not controverted by a subsequent pleading shall for the purposes of the action be deemed true.*

As the trial proceeded, the court held:

1. That the deposit of the thousand dollars was a condition precedent.

2. "That under the allegation in the petition, that plaintiff had duly performed all the conditions on his part, and the answer of the defendant, it was incumbent upon plaintiff to prove by affirmative evidence that he made the deposit as agreed to."

Trans., pp. 22, 23.

The charge, printed above, Trans., p. 25, was in accordance with this. The refusal to charge as requested—requests 1, 2, 3, printed *supra* Trans., p. 16—were upon the same idea.

We think the law is settled as embodied in the requests beyond all argument by the following cases:

*Coates vs. G. & C. U. R. R. Co.*, 18 Iowa, 277.
*Blackshire vs. The I. H. Co.*, 39 Id., 624.
*Stier vs. City of Oskaloosa*, 41 Id., 353.
*Gates vs. Carpenter*, 43 Id., 152.
*Mayes vs. Turley*, 60 Id., 407.

Allegations which are not denied *are to be taken as true*, and although evidence to controvert them had been received it

was the duty of the court to order judgment *in accordance with the admissions.*

*The Singer M. Co. vs. Billings*, 39 Id., 347.]

*Seventh.* If this provision did constitute a condition precedent, and if it was incumbent upon plaintiff to obtain the consent of the bank, it was waived by the instructions given by defendant to his agents not to allow a withdrawal of the money, and if, after that, defendant could still insist upon a strict performance of this condition upon the ground that his instructions were given without a personal and full knowledge of the facts by him it could only be done by giving plaintiff notice.

[*Thompson vs. Gray*, 1 Wheat., 84.

*Secombe vs. Steele*, 20 How., 94.

In the last case the agreement provided that the money should be deposited in the Merchants or Suffolk Bank in Boston. It was tendered to both of these banks and they refused to receive it. It was then deposited in the Bank of Commerce. This court said this was *prima facie* a *substantial* performance of the requirements of the contract. Page 105.

The defendant is estopped by his telegram, plaintiff's acting upon it, and his failure to notify plaintiff of his refusal to be bound by the arrangements between the agents.

Defendant's failure to notify plaintiff was a *waiver* of the place of deposit.

Benj. on Sales, Sec. 566.

Wade's Law of Notice, Sec. 668.]

*Eighth.* Defendant by his acts and his silence affirmed the acts of his agents.

1. The contract was made August 29. So alleged in both petition and answer. Trans., 22–23.

2. In September defendant refused to allow plaintiff to draw his money. Id., 24.

3. His letter of October 4 was not communicated to plaintiff. Ib., 25.

4. By his original answer he affirmed the contract and sought to recover the sum named as a forfeiture, as damages, for plaintiff's failure to perform upon his part. Id., 4.

See defendant's ninth request to charge. *Supra.*

The substance of all these questions, and perhaps they would have been better stated if put in that form, we think this:

*First.* Whether the letter from plaintiff to his own agents should, under the circumstances, have been received in evidence.

*Second.* Whether the clause in the contract as to a deposit of the forfeiture was a condition precedent.

*Third.* If it was, whether, under the *issues* and the rule as established in Iowa, the burden of proof was upon the plaintiff to show that he had performed upon his part.

*Fourth.* Whether, if the deposit at the particular bank was a condition precedent, and the burden of proof under the issues

upon the plaintiff, it was either waived or a substituted deposit accepted in its place.

GALUSHA PARSONS,
*of Counsel for Plaintiff in Error.*

PARSONS & PERRY,
*Attorneys.*

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1884.**

*No. 118.*

SOLOMON HALFERTY, PLAINTIFF IN ERROR,

*vs.*

HERMAN WILMERING.

When my attention was directed by your Honors, on yesterday, to the closing paragraph of the second division of the answer to the substituted petition—Tr., p. 11—as the thought indicated by the inquiry was entirely *new* to me, I did not give either as full or as satisfactory an answer as the record furnishes. I knew the fact was that there was no reference anywhere in the record to any *issue* other than that raised by the denials contained in the answer, and the further fact that the second *division* was withdrawn—bottom, page 13. Having the opportunity to examine the record with more care, I can now, I believe, answer the question to your honors' entire satisfaction.

1. It is provided by statute in Iowa that each separate defence shall be stated in a distinct *division* of the answer, shall be complete in itself, and *numbered:*

CODE, *Sec.* 2657.—Each affirmative defence shall be stated in a distinct DIVISION of the answer, *and must be sufficient in itself*, and must intelligibly refer to that part of the petition to which it is intended to apply.

*Section* 2705.—The counts of the petition must be consecutively *numbered* as such, and so must the *divisions* of the answer *as such*, and of the reply as such, * * * and see Sec. 2706.

2. The divisions of this answer are numbered 1 and 2.

3. The second division is written in paragraphs, and the first and longest paragraph is absolutely meaningless unless followed by the second, *it simply states the contract*, and the closing paragraph *alleges the breach*. The closing paragraph, looked upon in the light of a *denial of performance* by plaintiff, *does* make sense of itself, a thing that had not occurred to me until I was thrown off my feet by your Honors' inquire, and, as it is printed with the words "written on the margin *this division withdrawn*" taken from their place *in* the margin, and printed between it and the preceding paragraph, it *looks* as though it was something complete in itself, while it is in fact only an allegation of the manner in which the contract alleged in the preceding paragraph was broken by plaintiff. This is not only warranted by the *sense* which the two paragraphs taken together make, but the entire *want* of sense in the first if it stood alone. This is made still plainer by the words "written on margin in pencil *withdrawn*," fourth line of the second paragraph, as printed, taken from their place in the margin and *put in* between the formal part of the division "defendant says" and *what* he says. Your Honors can imagine how these things *looked* when written upon the margin, the first opposite, or nearly opposite, to the beginning of the first paragraph, and the other, in all probability, opposite to the beginning of the second paragraph and with reference to *that*, but so expressed, if there was any doubt as to the first, as to leave no doubt that it was that *division* was withdrawn.

4. Whatever was withdrawn was not withdrawn until after the *second division* was demurred to—demurrer filed October 21, second division withdrawn October 25. The de-

murrer shows with *certainty* how the person who drew it understood the answer, and by every reasonable and fair inference how the other side and the Court understood it, or it would not have been left in uncertainty. The demurrer is entirely meaningless and frivolous unless applied to the second division as a whole, and especially unless applied to the second paragraph. It was with reference to the alleged *breach of the contract*, and nothing else, that it was drawn. By the law of Iowa, in an action at law, the pleader must state the *grounds* of demurrer. The paragraph in question says *plaintiff never deposited said money.* No such allegation is contained in the first paragraph. The demurrer to this *division* says: *The failure to deposit said sum would not discharge defendant from his obligation to perform said contract upon his part*, and so of the other *reasons* contained in the demurrer. (Tr., p. 12.)

Again, this division of the answer begins by saying that defendant pleads the statement as an *affirmative* defence; and yet with this paragraph taken out—treated as another division—there is nothing stated in it but that defendant did make the very contract upon which plaintiff sues.

The whole difficulty, embarrassment, seems to me to arise from the fact that the clerk in making the transcript, instead of writing these words on the margin, where they belonged, and opposite to or at the beginning of the paragraph to which they referred, wrote them in the body, and especially when he added the words *written on margin*, in a *position* which would make it fairly inferrable that they related to what preceded instead of to the matter at the *beginning*, of which, as they were probably written, they stood opposite.

The form of pleading which we have adopted in the second count of the petition is not only authorized by statute, (Code, section 2715; brief, page eleven,) but is universally followed in Iowa.

GALUSHA PARSONS.